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Just Say Yes: Sell v. United States and Inadequate Limitations on the Forced Medication of Defendants in Order to Render Competence for Trial

Aaron R. Dias

JUST SAY YES: *SELL V. UNITED STATES* AND INADEQUATE LIMITATIONS ON THE FORCED MEDICATION OF DEFENDANTS IN ORDER TO RENDER COMPETENCE FOR TRIAL

I. INTRODUCTION

> Freedom, autonomy and self-determination are expressions of a noble aspiration that human beings should be able to maximize control over their own lives. None of these, however, can be regarded as absolute or unproblematic.[1]

Modern society is increasingly permeated with drugs and technologies that have potent effects on the human mind and body. Many mental illnesses and physical ailments can be banished with a simple pill. Undoubtedly, such technology has rendered the world a better place. However, technological advances are oftentimes ripe for abuse. In light of such scientific developments, in which the mind may be altered by the administering of one drug, there are few issues more important than an individual's right to control his or her own cognition and bodily integrity.

Indeed, the United States Supreme Court has weighed in on this topic. In 1990, the Court concluded that competent adults have a constitutional right to refuse medical treatment.[2] The Court determined that the freedom of a competent person to refuse medical treatment was a liberty interest protected by the Due Process Clause.[3] Of course, the operative word in the holding was "competent." *Cruzan* still left open the question of whether an incompetent adult has a constitutional right to refuse unwanted medical treatment. A trio of recent Supreme Court decisions address precisely this question.[4] In the most recent case, *Sell v. United States*,[5] the Court used a Fifth Amendment Due Process Clause analysis to conclude that the involuntary administration of antipsychotic drugs to an individual accused of a serious crime, in order to make him competent to stand trial, does not violate that individual's constitutional rights as long as "the treatment is medically appropriate,

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1. Kathleen Kneppler, *The Importance of Establishing Competence in Cases Involving the Involuntary Administration of Psychotropic Medications*, 20 LAW & PSYCHOL. REV. 97, 97 (1996) (quoting Alia Wells, *Patients, Consent and Criminal Law*, 1 J. SOC. WELFARE & FAM. L. 65, 69 (1994)).

2. Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990).

3. *Id.* at 278.

4. Sell v. United States, 123 S. Ct. 2174 (2003); Riggins v. Nevada, 504 U.S. 127 (1992); Washington v. Harper, 494 U.S. 210 (1990).

5. 123 S. Ct. 2174 (2003).

is substantially unlikely to have side effects that may undermine the fairness of the trial, and . . . is necessary" to achieve important governmental trial-related interests.[6] The Court admitted, however, that "those instances may be rare."[7]

The fact that the Court could envision such instances *ever* occurring is disturbing. *Sell* simply does not sufficiently protect an individual's bodily integrity. Had the Court coupled its consideration of the defendant's substantive due process rights with a consideration of the defendant's First Amendment right not to have his speech and thought manipulated by the government, the Court likely would have arrived at the more reasonable decision that the government can *never* forcibly medicate a defendant in order to render him competent to stand trial when the defendant is neither a danger to himself nor to others.

In addition to highlighting the problems of *Sell*, this Note argues that South Carolina courts, in applying the state constitution's heightened protections of the right to privacy,[8] should conclude that the state or local government can never forcibly medicate an individual solely for the purpose of rendering him competent to stand trial. Part II of this Note examines the facts, procedural history, and holding of *Sell*. Part III analyzes the shortcomings of the majority's holding while also emphasizing its strengths. Part IV discusses the implications of the leading cases in South Carolina, emphasizing in particular the relevance of the South Carolina Constitution, which has been found to be more protective of the right to privacy than the United States Constitution.

II. THE BACKGROUND OF *SELL*

Dr. Charles Thomas Sell, a former dentist, had "a long and unfortunate history of mental illness."[9] In 1982, Dr. Sell was hospitalized and treated with antipsychotic medication.[10] Before being released, he told doctors that communists had tampered with the material he used in fillings.[11] In 1984, Dr. Sell called police to his office to report that a leopard was boarding a bus. Once the police arrived,

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6. *Id.* 2184–85.

7. *Id.*

8. Article 1, section 10 of the South Carolina Constitution protects people from "unreasonable invasions of privacy." S.C. CONST. art. 1, § 10. Over the last ten years, the Supreme Court of South Carolina has interpreted this phrase to create a substantive right of privacy in South Carolina greater in scope than the analogous right afforded by the United States Constitution. *See, e.g.*, State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (noting that "state courts can develop state law to provide their citizens with a second layer of constitutional rights"); Singleton v. State, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993) (holding the forcible medication of an inmate for the sole purpose of facilitating execution would violate the state constitution's right to privacy). For further discussion of the authority of state courts to interpret their state constitutions as more protective of individual rights than the federal constitution, see *infra* note 95 and the sources cited therein.

9. *Sell*, 123 S. Ct. at 2179.

10. *Id.*

11. *Id.*

Dr. Sell begged them to shoot him. Again Dr. Sell was hospitalized and released.[12] Subsequently, Dr. Sell's condition appeared to deteriorate rapidly. He began claiming that various public officials, including the governor and chief of police, "were trying to kill him."[13] Finally, in April of 1997, Dr. Sell told law enforcement personnel that God told him he would save a soul for every FBI agent Sell killed.[14]

In May 1997, the United States charged Dr. Sell "with submitting fictitious insurance claims for payment."[15] Subsequently, a "grand jury . . . produced a superceding indictment charging Sell and his wife with sixty-two counts of fraud and one count of money laundering."[16] Initially, a federal magistrate judge found Dr. Sell competent and released him on bail.[17] However, Dr. Sell's condition apparently worsened, as evidenced by his spitting in the judge's face during a bail revocation hearing, which was initiated after Dr. Sell allegedly attempted to intimidate a witness.[18] The court revoked Dr. Sell's bail.[19] Subsequently, Dr. Sell "asked the Magistrate to reconsider [the issue of] his competence to stand trial."[20] Following an examination at a United States Medical Center for Federal Prisoners, Dr. Sell was found "mentally incompetent to stand trial."[21] Accordingly, the magistrate judge ordered Dr. Sell hospitalized for treatment and a determination of whether he could attain the competence necessary for his trial to proceed.[22] While hospitalized at the medical center, Dr. Sell refused to follow the medical center staff's recommendation to take antipsychotic medication.[23] Thereafter, the medical center decided to authorize the involuntary medication of Dr. Sell, prompting Dr. Sell to challenge this decision in court.[24]

Subsequently, the magistrate judge authorized the forced administration of drugs, finding, *inter alia*, that Dr. Sell was dangerous to himself and to others and that the medication was likely to restore Dr. Sell's competence to stand trial.[25] Dr. Sell appealed to the United States District Court for the Eastern District of Missouri. The district court held the magistrate judge's finding that Dr. Sell was dangerous to be "clearly erroneous," as Dr. Sell had recently been returned to an open ward.[26] However, the district court agreed with the magistrate judge's order permitting the forced medication of Dr. Sell. The court held that the government's interest in

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12. *Id.*
13. *Id.*
14. *Id.*
15. Sell v. United States, 123 S. Ct. 2174, 2179 (2003).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Sell v. United States, 123 S. Ct. 2174, 2179 (2003).
22. *Id.*
23. *Id.*
24. *Id.* at 2179–80.
25. *Id.* at 2180–81.
26. *Id.* at 2181.

restoring Dr. Sell to competency so that he could stand trial, along with the fact that the drugs were medically appropriate and were the only way to make Dr. Sell competent, was sufficient to warrant forcible medication.[27] The United States Court of Appeals for the Eighth Circuit affirmed, stating that the "government has an essential interest in bringing a defendant to trial."[28] The United States Supreme Court granted certiorari on the issue of whether the Eighth Circuit erred in rejecting the argument that medication forced against Sell's will violated his rights under the First, Fourth, and Sixth Amendments.[29] As a result, the Court resolved disagreement among the circuit courts of appeals as to the standard to apply when evaluating a government motion to forcibly medicate a defendant to render him competent to stand trial.[30]

This Note focuses on those parts of *Sell* regarding the involuntary medication of a defendant solely to render him competent to stand trial.[31] In formulating its opinion, the Supreme Court looked to two earlier Supreme Court decisions. In *Washington v. Harper*,[32] the Court held that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[33] The Supreme Court recognized that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."[34] While acknowledging that an inmate "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic

27. Sell v. United States, 123 S. Ct. 2174, 2181 (2003).

28. United States v. Sell, 282 F.3d 560, 568, 572 (8th Cir. 2002).

29. Sell v. United States, 537 U.S. 999 (2002).

30. *Sell*, 123 S. Ct. at 2184–85.

31. Though the first part of the Court's holding in *Sell* is beyond the scope of this Note, it warrants a short mention because it is the singular focus of the dissent. The Court held that the Eighth Circuit had jurisdiction to hear the appeal. *Id.* at 2183. Under the majority's reasoning, the district court's pretrial order allowing the forced medication of Dr. Sell was an appealable "collateral order" within the exceptions to the rule that only final judgments are appealable. *Id.* at 2182. In support, the Court noted that the order satisfied a three-part test outlined in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). First, the order conclusively determined whether Dr. Sell may avoid the attempted involuntary medication. Second, the order resolved an important issue of constitutional significance. Third, the issue was basically "unreviewable on appeal from a final judgment" because by that time Dr. Sell would have already been forcibly medicated, which is precisely what he was trying to avoid. *Sell*, 123 S. Ct. at 2182. The dissent saw this as "a breathtaking expansion of appellate jurisdiction over interlocutory orders." *Id.* at 2190 (Scalia, J., dissenting). Specifically, Justice Scalia (with whom Justices O'Connor and Thomas joined) believed that this situation fails to satisfy the third of the collateral order exception requirements; that is, he believed that the order is not unreviewable on appeal. *Id.* at 2191. Justice Scalia also feared that the majority's holding would allow defendants "to engage in opportunistic behavior" by, for example, waiting until mid-trial to appeal such an order, thereby disrupting the entire criminal proceeding. *Id.* at 2190. While such jurisdictional issues are interesting, they are not the focus of this Note.

32. 494 U.S. 210 (1990).

33. *Id.* at 227.

34. *Id.* at 229.

drugs,"[35] the Court held that the State's interest was important enough to allow such treatment where the inmate was a danger to himself or to others.[36]

The *Sell* Court also looked to *Riggins v. Nevada*.[37] *Riggins* involved an individual's appeal of his murder and robbery convictions based on the ground that the state forced antipsychotic medication upon him *during* trial, in violation of his constitutional right to a fair trial.[38] In *Riggins*, "the Court repeated that an individual has a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs'—an interest that only an 'essential' or 'overriding' state interest might overcome."[39] The *Riggins* Court concluded that where the State seeks to administer antipsychotic drugs to a defendant during trial, due process is satisfied if "treatment with antipsychotic medication [is] medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant's] own safety or the safety of others."[40] The *Riggins* Court went on to note that a state might be able to "justify medically appropriate, involuntary treatment with [a] drug by establishing that it could not obtain an adjudication of [the defendant's] guilt or innocence by using less intrusive means."[41] Thus, *Riggins* "suggested that, in principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible."[42]

It was under the framework of these two cases that the Court in *Sell* addressed the issue of whether a state may involuntarily medicate a defendant solely for the purpose of securing his competency. The Court appears to have applied a strict scrutiny standard, although it did not explicitly say so. The application of strict scrutiny is appropriate under such circumstances.[43] The Court recognized that the freedom to reject medical treatment was a significant liberty interest.[44] The Court established a four-part test suggesting the governmental action must be narrowly tailored, but recognizing that the government has a significant interest in the adjudication of serious crimes.[45] As such, the Court set up Dr. Sell's case as one worthy of determination under strict scrutiny: The right being infringed upon (the right to reject medical treatment) is a fundamental right, therefore, the government action (forcible medication) must be narrowly tailored to attain a compelling

35. *Id.* at 221.

36. *Id.* at 236.

37. 504 U.S. 127 (1992); *see* Sell v. United States, 123 S. Ct. 2174, 2183–84 (2003) (discussing *Riggins*, 504 U.S. 127).

38. *Riggins*, 504 U.S. at 129.

39. *Sell*, 123 S. Ct. at 2183 (quoting *Riggins*, 504 U.S. at 134, 135).

40. *Riggins*, 504 U.S. at 135.

41. *Id.*

42. *Sell*, 123 S. Ct. at 2183.

43. *See, e.g.*, United States v. Brandon, 158 F.3d 947, 956 (6th Cir. 1998) ("Government action that burdens a fundamental right will survive a substantive due process challenge only if it can survive strict scrutiny, i.e., if it is narrowly tailored to a compelling governmental interest.").

44. *Sell*, 123 S. Ct. at 2183.

45. *Id.* at 2184.

government interest.

The Court summarized its ruling as follows:

> These two cases, *Harper* and *Riggins*, indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.[46]

Under this standard, the Supreme Court recognized that the instances allowing for the administration of drugs for the sole purpose of restoring trial competence would be rare.[47] The Court reasoned such cases would be rare because it envisioned that the following four-part test would sufficiently limit those instances.[48]

First, "a court must find that *important* governmental interests are at stake."[49] The Court acknowledged that bringing a defendant accused of a "serious crime" to trial is an important governmental interest.[50] However, the Court also recognized that the special circumstances of each individual case might decrease the significance of that interest. Specifically, two situations may lessen the importance of the government's interest in prosecuting those accused of serious crimes. One such situation involves the defendant's refusal to take medication of his own accord, leading to a prolonged confinement at a mental institution and "diminish[ing] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime."[51] The Government must also balance its interest in adjudicating crimes with its "constitutionally essential interest in assuring that the defendant's trial is a fair one."[52] Thus, the fact that the accused would not simply be set free, but could actually spend considerable amounts of time confined in an institution, coupled with the government's interest in guaranteeing a fair trial, serves to decrease the importance of the government's interest in convicting offenders of serious crimes.

The second element of the Court's four-part test states that the court must determine that forcible medication will "*significantly further*" the government

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Sell v. United States, 123 S. Ct. 2174, 2184 (2003).
51. *Id.*
52. *Id.*

interests that are at stake.[53] Thus, the Court must determine that the medication is "substantially likely" to restore the defendant's competence and "substantially unlikely" to have side effects that "interfere significantly" with the defendant's ability to assist in his own defense.[54]

Third, the court must find that forced medication is "*necessary* to further those [concomitant] interests" that are at stake.[55] As such, the court must consider whether any less intrusive alternative measures could achieve the same, or a substantially similar, result. By way of example, the Court notes that in some cases, nonpharmaceutical therapies may be able to restore competence.[56]

Fourth, the court must find that the "administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition."[57] This determination may require a weighing of a specific drug's possible side effects as well as potential for success.[58]

Finally, the Court noted that courts do not have to consider these four criteria "if forced medication is warranted for a *different* purpose."[59] Alternative purposes include situations in which the defendant is a danger to himself or others and situations in which the defendant's health is severely at risk without the medication.[60] Thus, "[i]f a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear."[61]

The Court then proceeded to apply these standards to Dr. Sell's situation. The Court concluded that the court of appeals incorrectly approved the involuntary drugging "solely to render [Dr.] Sell competent to stand trial,"[62] as Dr. Sell was not dangerous to either himself or others. The Court noted that the vast majority of evidence at the magistrate's hearing dealt with Dr. Sell's alleged dangerousness. However, the district court found that Dr. Sell was not dangerous (as shown by his return to an open ward), and this issue was never appealed. Reflecting this fact, the Court noted that there was a dearth of evidence relating to the issue of trial competence.[63] Thus, there was no evidence to aid in determining whether the suggested drug had side effects that were likely to undermine the fairness of Dr. Sell's trial. Also, the lower courts did not consider that Dr. Sell had already been held at the United States Medical Center for Federal Prisoners in Springfield,

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53. *Id.*
54. *Id.* at 2184–85.
55. *Id.* at 2185.
56. Sell v. United States, 123 S. Ct. 2174, 2185 (2003) (citing Brief of Amicus Curiae American Psychological Association at 10–14).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 2185–86.
62. Sell v. United States, 123 S. Ct. 2174, 2187 (2003).
63. *Id.*

Missouri, for a significant period of time. Nor did the lower courts consider whether his refusal to take the medication might result in continued confinement.[64] Therefore, the Supreme Court remanded the case for further consideration of these issues.[65]

The Court's apparent application of strict scrutiny with respect to the forced administration of antipsychotic medication indicates the appropriate reverence to the pretrial detainee's constitutional right to due process of law, his liberty interest in freedom from bodily intrusion, and his right to a fair trial. Thus, *Sell* offers an individual significant safeguards from unwelcomed government medication. However, these safeguards do not provide the amount of protection that the United States Constitution warrants.

III. THE SHORTCOMINGS OF *SELL*

Ultimately, the Supreme Court held that the Constitution *does*, in appropriate circumstances, allow the government "to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes."[66] The Court noted that under its due process analysis, "those instances may be rare."[67] However, if the Court had additionally considered Dr. Sell's significant First Amendment rights, the Court would have been more likely to arrive at the conclusion that the government could *never* forcibly medicate a mentally ill defendant *solely* for the purpose of rendering him competent to stand trial.

A. Due Process Analysis

Before addressing the First Amendment concerns, it is useful to consider the due process analysis that the Court applied. As previously noted, the Court appears to have applied strict scrutiny review in line with several lower court rulings that adopted strict scrutiny approaches in analogous circumstances.[68] However, the Court could have rescued its opinion from arguable ambiguity had it clearly stated the appropriate standard of review as strict scrutiny, especially since the two cases on which it most heavily depends, *Harper* and *Riggins*, do not follow a strict scrutiny standard.

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64. *Id.* at 2187.

65. *Id.*

66. *Id.* at 2178.

67. *Id.* at 2184.

68. *See supra* notes 43–46 and accompanying text; *see, e.g.*, United States v. Brandon, 158 F.3d 947, 960 (6th Cir. 1998) ("[W]e conclude that the decision to medicate a nondangerous pretrial detainee must survive strict scrutiny."); Bee v. Greaves, 744 F.2d 1387, 1394–95 (10th Cir. 1984) ("[W]e question whether this interest [of bringing accused criminals to trial] could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotic drugs.").

In *Harper*, the Court used rational basis review to evaluate a prison's decision to involuntarily medicate a dangerous convicted felon.[69] However, the use of strict scrutiny in *Sell*-type situations does not conflict with the use of rational basis review in *Harper*. Indeed, "*Harper's* rationale is based upon the premise that if the government's action focuses primarily on matters of prison administration, then the action is proper if reasonably related to a legitimate penological interest, even if it implicates fundamental rights."[70] The legitimate penological interest in *Harper* was the maintenance of safety and security at the prison.[71] The main factual differences between *Harper* and *Sell* are that *Harper* involved prison administration rather than trial administration, and that Dr. Sell was not a danger to himself or to others.

Riggins's standard of review is more confusing. The Court seems to have applied strict scrutiny by stating that due process would have been satisfied in limited circumstances:

> [Involuntary medical treatment would be permissible if] treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means.[72]

As Justice Thomas stated in his dissent, "[t]he Court today . . . appears to adopt a standard of strict scrutiny."[73] However, the majority sought to dispel this appearance of adopting strict scrutiny by explicitly stating that it did not adopt *any* standard.[74] While the *Riggins'* standard is similar to *Sell's* four-part test, *Riggins'* denial of having adopted strict scrutiny coupled with *Sell's* apparent adoption of strict scrutiny is confusing. The Court in *Sell* would have been well-served to state explicitly the proper standard of review and thereby avoid the ambiguity inherent

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69. Washington v. Harper, 494 U.S. 210, 223 (1990) ("[T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'") (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

70. *Brandon*, 158 F.3d at 957.

71. *Harper*, 494 U.S. at 223.

72. Riggins v. Nevada, 504 U.S. 127, 135 (1992) (citations omitted).

73. *Id.* at 156 (Thomas, J., dissenting).

74. *Id.* at 136:

> Contrary to the dissent's understanding, we do not 'adopt a standard of strict scrutiny.' We have no occasion to finally prescribe such substantive standards . . . since the [court] allowed administration of [the drug] to continue without making *any* determination of the need for this course or any findings about reasonable alternatives.

Id. (citations omitted).

in an analysis based on one case with a lower standard (*Harper*) and one case that arguably applies no standard at all (*Riggins*).

Additionally, in its Due Process Clause analysis, the Court failed to recognize that an individual's due process rights may override the government's prosecutorial interests. The Court, on several occasions, has recognized that the government's prosecutorial interests are not sufficient to eclipse an individual's right to maintain his own bodily integrity.[75] Past Supreme Court rulings demonstrate that an individual's liberty interests often outweigh the government's interest in the adjudication of crimes. For example, in *Ferguson v. City of Charleston*,[76] the Court struck down a Medical University of South Carolina program that allowed state hospital obstetrics patients who tested positive for cocaine in urine tests conducted by hospital staff to be arrested pursuant to a policy developed in conjunction with the local police.[77] The Court held such a program intruded upon an individual's right to privacy.[78] Similarly, in *Winston v. Lee*,[79] the Supreme Court disallowed the surgical intrusion into an attempted robbery suspect's chest to recover, for evidentiary purposes, the bullet fired by the victim.[80] Also, in *Rochin v. California*,[81] the Supreme Court held that the forced stomach-pumping of an individual for the purpose of recovering allegedly swallowed narcotics was violative of that individual's due process rights.[82] The *Sell* Court should have recognized, from the precedent set by these cases, that an individual's right to preserve his own bodily integrity outweighs the government's interest in bringing him to trial. The Court's failure to do so illustrates a significant shortcoming of the holding in *Sell*.

B. The Court's Failure to Consider Sell's First Amendment Rights

The Court in *Sell* failed to mention any of the significant First Amendment implications of forcibly medicating pretrial detainees for the sake of rendering them competent to stand trial. The failure to discuss any First Amendment issues is rather surprising given the fact that some lower courts have given weight to a defendant's

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75. *See generally* Russell G. Donaldson, Annotation, *Admissibility, in Criminal Case, of Physical Evidence Obtained Without Consent by Surgical Removal from Person's Body*, 41 A.L.R. 4th 60 (1985) (collecting cases that address the admissibility of evidence which has been forcibly obtained through surgery).

76. 532 U.S. 67 (2001).

77. *Id.* at 84–86.

78. *Id.* at 78 ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.").

79. 470 U.S. 753 (1985).

80. *Id.* at 759 ("A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime.").

81. 342 U.S. 165 (1952).

82. *Id.* at 172 (stating that there is no "constitutional differentiation" between these intrusive methods and "the rack and the screw").

First Amendment concerns when seeking to avoid forcible medication.[83] *Sell* would have been more appropriately decided either solely through a First Amendment analysis or by use of a First Amendment analysis in conjunction with the due process analysis. Had the Supreme Court employed such an approach, it is more likely that the majority would have concluded that the government can *never* involuntarily drug a nonviolent pretrial detainee solely to render him competent to stand trial where he is neither a danger to himself or to others. Even though permissible instances of forced medication will be rare, the mere possibility that the Court envisions *any* such instances is disturbing.

Our nation has a long history of holding sacred one's bodily integrity.[84] It is also doubtless that Dr. Sell has a fundamental First Amendment interest in not having his speech and very thoughts manipulated by the government.[85] The Supreme Court has recognized this right as one of an individual's most important interests.[86] The forcible medication of Dr. Sell implicates First Amendment rights that the Court failed to consider—rights that are "separate and distinct" from due process rights that the Court did consider.[87] The forcible medication of an individual threatens not only one's own bodily integrity, but also one's very ability to think freely.[88] Such forcible medication is tantamount to the government's controlling its citizens' minds. Few propositions are more frightening.[89] Dr. Sell has "a First Amendment interest in avoiding forced medication" because it "may

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83. In *United States v. Gomes*, 289 F.3d 71 (2d Cir. 2002), the United States Court of Appeals for the Second Circuit recognized that a defendant's "First Amendment rights are in large part co-extensive with his due process liberty interest in avoiding unwanted medication." *Id.* at 84. Also, the court in *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998) recognized a First Amendment interest to avoid forced medication because it may interfere with the detainee's communication of ideas to an attorney and to the court. *Id.* at 960. In *United States v. Santonio*, No. 2:00-CR-90C, 2001 U.S. Dist. LEXIS 8647, at *1 (D. Utah May 3, 2001), the district court also recognized a First Amendment interest in avoiding forced medication and stated that "medical literature . . . suggests that antipsychotic drugs affect a patient's ability to communicate." *Id.* at *13. The court noted that "antipsychotic drugs could hamper [the defendant's] ability to communicate ideas at trial, either to counsel or while testifying, thus limiting his ability to full participate in his own defense." *Id.* at *15.

84. *See generally* Davis v. Hubbard, 506 F. Supp. 915, 930 (N.D. Ohio 1980) ("In the history of the common law, there is perhaps no right which is older than a person's right to be free from unwarranted personal contact.").

85. *See* Brief Amicus Curiae American Civil Liberties Union of Eastern Missouri at 6–10, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664).

86. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) (recognizing that "the First Amendment bars the government from dictating what we see or read or speak or hear").

87. Reply Brief of Petitioner at 2, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664).

88. As the United States Court of Appeals for the Fourth Circuit recognized in *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987), "[w]here, as here, medication which is potentially mind altering is concerned, the threat to individual rights goes beyond a threat of physical intrusion and threatens an intrusion into the mind." *Id.* at 492.

89. As such, the Court recently noted that "[f]irst Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom . . . ." *Free Speech Coalition*, 535 U.S. at 253.

interfere with his ability to communicate ideas."[90] This idea directly implicates the defendant's Sixth Amendment right to a fair trial—an idea that is alluded to in *Sell's* holding.[91] If the defendant's thought process is altered, he may be unable to assist in his own defense.[92]

The Court's failure to even address these First Amendment concerns is puzzling. As the dissent in the Eighth Circuit's *Sell* decision suggests, the defendant's First Amendment rights, when considered along with his Fifth Amendment due process rights and his Sixth Amendment right to a fair trial, must outweigh the government's adjudication interests.[93]

IV. IMPLICATION FOR SOUTH CAROLINA

While *Sell* affords a great deal of protection to one's right to bodily integrity by requiring the government to satisfy a difficult four-part test, the Court does envision some instances in which the government would be permitted to forcibly medicate a defendant solely for trial competency purposes. However, in South Carolina, the state constitution's explicit protection against invasions of privacy dictates that the government may never forcibly medicate a defendant solely for the purpose of standing trial.

Article I, section 10 of the Constitution of the State of South Carolina provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.[94]

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90. United States v. Brandon, 158 F.3d 947, 953 (6th Cir. 1998); *see also* Bee v. Greaves, 744 F.2d 1387, 1393–94 (10th Cir. 1984) ("Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate.").

91. Sell v. United States, 123 S. Ct. 2174, 2185 (2003).

92. *Id.* at 2185.

93. United States v. Sell, 282 F.3d 560, 574 (8th Cir. 2002) (Bye, J., dissenting); *see also Bee*, 744 F.2d at 1395 ("[A]lthough the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotic drugs.").

94. S.C. CONST. art I, § 10 (emphasis added). The South Carolina Constitution should be compared with the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This difference between the United States Constitution and the South Carolina Constitution is significant, given that "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution."[95] Thus, state courts can develop their own constitutional law and thereby afford a "second layer of constitutional rights."[96]

Significantly, the Supreme Court of South Carolina has observed that "by articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution."[97] South Carolina courts additionally have recognized that this provision creates a distinct right to privacy with regard to not only searches and seizures but to other contexts as well,[98] such as the situation of Dr. Sell.

The South Carolina General Assembly adopted the words "unreasonable invasions of privacy" in 1971.[99] The Supreme Court of South Carolina takes such additions seriously, as no words in the state constitution may be regarded as mere surplusage.[100] The state supreme court applied this substantive right of privacy to the situation of forcible medication in *Singleton v. State*.[101] In considering Article I, section 10 of the South Carolina Constitution, the supreme court held that the state constitutional right of privacy would be violated by the forced medication of a defendant solely for the purpose of restoring competency to allow for his

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U.S. CONST. amend. IV.

95. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (quoting State v. Easler, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 625 n.13 (1997)); *see also* Jernigan v. State, 340 S.C. 256, 263–65, 531 S.E.2d 507, 511–12 (2000) (discussing South Carolina statute that provides greater rights than a similar federal statute); Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 329 S.C. 371, 376, 496 S.E.2d 17, 19 (1998) ("[o]f course, state courts may provide more expansive rights under their own constitutions than the rights conferred by the United States Constitution."). The United States Supreme Court concurs that states may provide protections above and beyond those of the United States Constitution. *See, e.g.*, California v. Ramos, 463 U.S. 992, 1013–14 (1983) ("It is elementary that states are free to provide greater protection in their criminal justice system than the Federal Constitution requires."); Mills v. Rogers, 457 U.S. 291, 300 (1982) (noting that states can provide greater "liberty interests" than the Constitution); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (same); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (noting with approval the developing trend of state courts to provide greater individual protections under their state constitutions in the face of apparent contractions of federal rights that have occurred since 1969).

96. *Forrester*, 343 S.C. at 643, 541 S.E.2d at 840.

97. *Id.* at 644, 541 S.E.2d at 841.

98. *Id.*

99. *See* S.C. CONST. art. I, § 10 (amending S.C. CONST. art. I, § 16).

100. Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993)

> This Court is bound to presume that the framers of the constitution had some purpose in inserting every clause and every word contained in the document. It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning.

Id.

101. 313 S.C. 75, 437 S.E.2d 53 (1993).

execution.[102] The court specifically noted that "the *Riggins* and *Harper* decisions have established the federal due process analysis" for this situation but that they did not answer the South Carolina constitutional question.[103] The *Singleton* court held that an inmate, in exercising his privacy rights, could refuse medication that had the possibility of restoring his competence to be executed.[104] If a person already convicted of murder, burglary, larceny, and first-degree criminal sexual conduct can constitutionally refuse medication to restore his competency, then certainly a pretrial detainee, who is presumed innocent, may likewise refuse such medication. It is well-settled that a pretrial detainee maintains at least as many rights as a person already convicted of a crime.[105] Therefore, it stands to reason that a defendant would have the right to refuse unwanted medication similar to the convicted prisoner's right to refuse unwanted medication.

Thus, as South Carolina provides a specific right to privacy in its constitution, the State of South Carolina may not forcibly medicate a pretrial detainee solely for the purpose of rendering him competent to stand trial.

IV. CONCLUSION

The right to preserve one's bodily and mental integrity is a fundamental right. The United States Supreme Court recognized this fact in *Sell v. United States* by applying a strict scrutiny due process analysis to the question of whether the involuntary administration of psychotropic drugs to an individual accused of a serious crime in order to make him competent to stand trial violates that individual's constitutional rights. The Court formulated a test that would allow such medication only in rare circumstances. Had the Court gone beyond a due process analysis to include a consideration of the defendant's First Amendment rights, the Court would have rightly determined that such forcible medication is never constitutional. Yet, in South Carolina, the boundaries of the federal right to reject such medication are ultimately irrelevant as such governmental action would almost certainly fail judicial review, since the state constitution is more protective of privacy rights than the federal constitution.

Aaron R. Dias

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102. *Id.* at 88–89, 437 S.E.2d at 61.

103. *Id.* at 88, 437 S.E.2d at 60.

104. *Id.* at 89, 437 S.E.2d at 61 ("An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however, the inmate must be free from unwarranted medical intrusions.").

105. Riggins v. Nevada, 504 U.S. 127, 135 (1992) ("[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial."); Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").